Michael H. Gold
350 Fifth Avenue, Suite 6800
New York, New York
10118
Tel (212) 838-0699
Fax (212) 868-0013

April 12, 2017

Honorable Alison J. Nathan
United States District Court
United States District Judge
Foley Square Courthouse
New York, New York 10007

Re: United States v. Rasheid Butler, 15 CR. 95-26, (AJN)

Dear Judge Nathan:

I am writing on behalf of my client, Rasheid Butler, regarding his sentence on April 19, 2017. In consideration of his age and his overstated criminal history category, which grossly exaggerates his past since he does not even have a criminal record, we respectfully urge the Court to impose a sentence within criminal history category I of 87-108 months rather than the category II range of 97-121. As well, Mr. Butler should receive credit for 18 months spent incarcerated pursuant to a juvenile delinquency adjudication that the government acknowledges is relevant conduct. Therefore, we respectfully request a sentence of 70 months.

In reaching an appropriate decision at sentencing, the Court must be guided by the facts and circumstances of the particular case. Under *United States v. Booker*, 125 S. Ct. 738 (2005), this Court is no longer bound by the federal sentencing guidelines but must, instead, consider the applicable guideline range as but one factor among several in determining an appropriate sentence. *Kimbrough v. United States*, 128 S.Ct. 554, 574 (2007). The guidelines are only the “starting point and initial benchmark..” *Id., citing Gall v. United States*, 128 S.Ct.586, 596 (2007). It is the sentencing judge who has the advantage of familiarity with the details of the case and can best evaluate the import of the § 3553(a) factors. *Id.*, *Kimbrough*, 128 S.Ct.at 574, citing *Gall*, 128 S.Ct. at 597. The Court may not simply presume that the guideline range is reasonable. *Gall*, at 597. Rather, the Court must make an individualized assessment based on the facts presented.

From its unique vantage point, the Court may conclude that, despite the guidelines, "in a particular case, a within-Guidelines sentence is 'greater than necessary' to accomplish the goals of sentencing . . ." *Kimbrough.*, 128 S.Ct. at 570, *citing* 18 U.S.C. § 3553(a). The not "greater than necessary" language of the federal sentencing statute incorporates the need for the sentence to "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense. " 18 U.S.C. § 3553(a). Indeed, as the Supreme Court suggested in *Gall*, a sentence of imprisonment may not promote respect for the law if it appears unduly harsh in light of the real conduct and circumstances of the particular case. *Gall*, 128 S.Ct. at 599.

The factors weighing into the imposition of a reasonable sentence include:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for--
>> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines... ;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

18 U.S.C. § 3553(a).

Here, the sentencing factors permit lenity. As set forth in the presentence report, Mr. Butler, who is barely 20 years old, was raised by his mother and had no contact with or knowledge of his father. His father was incarcerated for 16 years when Mr. Butler was a small child and he hasn't seen him since. While he has seven maternal siblings, he only has a relationship with his older brother Martin Mitchell, a co-defendant herein, with whom he lived along with his mother. Mitchell became a father figure to Mr. Butler and while he attempted to keep him from gang related activities, Mr. Butler followed his brother as if he were attached, absorbed the culture and succumbed to its perverse attraction.

In 2013, at the age of 13, Mr. Butler had a fight with a friend and was adjudicated a juvenile delinquent for stealing his Ipad. He served an 18 month reformatory term and did not have any further juvenile adjudications or adult convictions. Nevertheless, despite *never having been convicted of a crime*, Mr. Butler is considered a category II offender, which raises his sentencing exposure from 87-108 months to 97-121 months.

Mr. Butler's stint in juvenile detention offered him no reformatory help. Upon his release, he began abusing marijuana on a daily basis, dropped out of school after the 10th grade and became more involved with the gang. However, his conduct and actions since his arrest demonstrate his disavowal of that life and, instead, a resolution to prepare for a law abiding one.

While in MCC, Mr. Butler has enrolled in GED classes and is scheduled to take his exam in April, 2017. He has also taken several other classes, including anger management, entrepreneur, and business and leadership programs. Specifically, he completed an 8 week course with "Lead by Example & Reverse the Trend Inc., " (LBE & RTT Inc.), Self Improvement Violence Prevention Mentoring Program and, as indicated in the attached letter, the program wishes to employ him to assist others who are at risk of succumbing to the same mistakes. Upon his ultimate release, he hopes to pursue a career in auto mechanics or computer programming. He is sincerely committed to a law abiding life and has taken all steps available at this juncture to ensure his success.

As stated, the PSR correctly applies guideline level 29 and ascribes a criminal history category II despite the lack of a criminal conviction. They assess 2 points for his juvenile delinquency adjudication, when he was 13, and, consequently, his sentence exposure is elevated from 87-108 months to 97-121 months. Simply put, his history points overstate the seriousness of his singular adjudication and under represents the effect of immaturity in his actions at a very young age.

As a general matter, "[r]ecidivism rates rise as criminal history points increase and as CHCs increase." *U.S. Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, at 15 (May2004).* [1] Category II is thus designed to encompass prior criminal offenders, technically even juvenile delinquency adjudications. Nonetheless, the Sentencing Commission recognized that the Guidelines might not always account for cases like this one, where the "criminal" conduct was committed by a 13 year old, and therefore designed § 4A1.3 to address situations where the defendant's history of adjudications and convictions place the defendant in a category usually reserved for those with substantially more serious criminal histories. Mr. Butler respectfully asks that the Court depart horizontally pursuant to this Section.

It is well-settled that a "departure under § 4A1.3 is specifically authorized by the Sentencing Guidelines whenever the computed criminal history significantly under-represents' or 'significantly over-represents' the seriousness of defendant's criminal history or the likelihood that the defendant will commit further crimes." *United States v. Pinckney, 938 F.2d 519, 521 (4th Cir. 1991).* As the Court explained: "Criminal history" is, relatively, one of the most flexible concepts in the guidelines. While it is possible to classify the severity of current federal offenses with a reasonable degree of precision, mathematically accurate evaluation of the countless possible permutations of criminal history, involving offenses of high and petty committed in numerous jurisdictions, would be at best unwieldy. The Sentencing Commission recognized this difficulty, and though it prescribed a mathematical method to calculate criminal history, it specifically identified overstatement or understatement of the seriousness of the defendant's past conduct as a ground for departure from the raw criminal history score. *United States v. Mishoe, 241 F.3d 214 (2nd Cir. 2001); United States v. Adkins, 937 F.2d 947, 952 (4th Cir. 1991);*

---

[1] This report is available at: 1 http://www.ussc.gov/publicat/Recidivism_General.pdf). Interestingly, the report found "no correlation between recidivism and guidelines' offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar." Id. at 15.

accord United States v. Summers, 893 F.2d 63, 67 (4th Cir. 1990) (affirming downward departure based on criminal history).

Accordingly, a departure may be warranted based on a consideration of factors relevant to determine whether the PSR calculation significantly over-represents a defendant's criminal history or the likelihood that the defendant will commit further crimes. See § 4A1.3. In *Summers*, for example, the Fourth Circuit affirmed a downward departure on the ground that the defendant's criminal history category overstated the severity of the defendant's criminal history, which included "convictions for grand larcenies, possession of narcotics, a weapons violation, driving with suspended license violations and probation revocation." 893 F.2d at 65.

Likewise, in *United States v. Nelson, 166 F. Supp. 2d 1091 (E.D. Va. 2001)*, the Court granted a motion for a downward departure based on overstatement of criminal history from Level VI to Level III. In its discussion of the relative characteristics of defendants within criminal history categories, the Court identified a typical case involving a defendant who had been properly classified within criminal history category VI, and noted that the defendant's record in that case consisted of "possession of cocaine, three points for possessing cocaine with intent to distribute in a school zone, two points for assault, one point for possession of drugs, one point for assault, and three points for possession of cocaine" Id. at 1097. The defendant's criminal record at issue in *Nelson*, the Court held, "does not reflect the history of narcotics distribution and violent behavior present in [that] criminal record." Id. at 1098. In fact, the Court ruled that Mr. Nelson's criminal history was much more in line with category III than category VI.

Mr. Butler's criminal history similarly was elevated above a fair representation of its severity. Two points were ascribed for an adjudication when he was 13 years old and had a conflict with a friend that escalated into a judicial intervention. He has never been convicted of a crime. Moreover, since his arrest and incarceration he has taken an assortment of self-help and remedial steps to prepare for a crime free life upon his release. As such, we urge the Court to horizontally depart and sentence him as if he were a category I offender on a first time offense.

Moreover, the government, in its *Pimental* letter, acknowledges that the juvenile adjudication was relevant and related conduct and, therefore, Mr. Butler should receive credit for the time served therein. Pursuant to 5G1.3 (b)(1)(2),(c) and (d), commentary note (5), the Court, respectfully, should reduce the intended sentence by 18 months to reflect time served that will not be credited by the Bureau of Prisons since the defendant did not serve the sentence in federal custody and it preceded the instant indictment.

Nothing preceding is offered to blame others or diminish Mr. Butler's responsibility for his own conduct. He alone bears the burden of his guilt and he carries it deeply. However, the events that shaped his thinking and made him vulnerable to impossibly bad choices is relevant in determining his sentence. He was young, immature and subject to the pressure of peers. Most importantly, he recognizes the harm he has caused himself and others and is determined and committed to improving himself. He is only 20, intends to graduate high school and dreams of re-routing his life to a productive and law abiding future.

For the foregoing reasons, we respectfully request that a sentence be imposed as a category I offender, with credit for 18 months served and a total sentence of 70 months.

Thank you for consideration of this application.

Respectfully submitted,

Michael H. Gold